(47)

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 180 OF 1990

Dalpratap and another

Vs.

State of Madhya Pradesh
(Now Chhattisgarh)

JUDGMENT

Post for 22.03.2007

Sd/-
Sunil Kumar Sinha
Judge

D/ 03-07

(48)

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 180 OF 1990

Appellants:

1. Dalpratap, son of Chandrabhan Singh, aged about 25 years,

2. Kamal Singh alias Gopal, Aged about 25 years, s/o Shyamlal Gond,

Both labourers, resident of Khoganpani, P.S. and Tahsil Manendragarh, Distt. Sarguja, (now Distt. Koria)(C.G)

Versus

Respondent: State of Madhya Pradesh (Now Chhattisgarh)

Appearance:

Shri Abdul Wahab Khan, counsel for appellant no.1.

Smt. Usha Chandrakar, counsel for appellant no.2.

Shri Arun Sao, Govt. Advocate for the State.

JUDGMENT
(22.3.2007)

Sunil Kumar Sinha, J,

(1) This appeal is directed against the judgment of conviction and order of sentence dated 18th January 1990 passed by Addl. Sessions Judge, Manengragrah, in Sessions Trial No.23/1988, whereby the appellant no.1 has been convicted u/s 307 I.P.C. and section 25-A of the Arms Act and sentenced to undergo R.I. for 4 years and six months respectively with a direction to run the sentences concurrently and the appellant no.2 has been convicted u/s 307 read with section 34 I.P.C. and sentenced to undergo R.I. for 4 years.

(2) The brief facts are that Ramjan (P.W.4) was a Chowkidar in a Video hall. On 3.8.1987, after the second show was over, he along-with the appellants were sleeping on *Dari* in the hall itself. At about 1-2 a.m, he heard some noise and when he woke up, Gopal (accused no.2) caught him and Dalpratap (accused no.1) gave two knife blows to him one on his stomach region and the other on his right thigh and thereafter both of them tried to run away. Accused no.1 was caught on the spot by one Dhanesh Mishra. However, accused no.2 succeeded in running away from the place of occurrence. Mahesh Tiwari, a worker of the video hall, immediately went to the Police Sahayata Kendra, Khogapani and lodged a report, on which, a *Dehati Nalishi* was recorded on 03.8.1987. Ramjan (P.W.4) was sent for medical examination to the Community Health Center, Manendragarh, through a requisition under Ex.P-6/A, from where he was referred to Central Hospital, Manendragarh. He was admitted in the said hospital at about 6 a.m. and was treated through Bed Head Tickets Ex.P.1 to P.14 and was ultimately discharged on 11.8.1987. During the course of investigation, blood stained soil and plain soil were seized from the place of occurrence and on 3.8.1987 at about 7.30 a.m., the First Information Report vide Crime No.270/1987 was registered in Police station Manendragrah under section 307 I.P.C. & section 25 of the Arms Act. Dalpratap was arrested at the scene of occurrence itself and at about 3 a.m., on the same day, one *Rampuri Knife* (Article A), one white full Pant (Article B) and one Jersey (Article-C) were seized from his possession under Ex.P-3. The shirt (Article D) and Pant (Article E) were also seized from accused

no.2 Kamal Singh after taking of them from the body of this accused. The said *Dari*, stained with blood, was also seized under Ex.P.9. All the articles, seized during the course of investigation, were sent for their chemical examination to the Director, Forensic Science Laboratory, Sagar, under Ex.P.10. The report was received under Ex.P.11. Thsse articles were further sent to the Science Laboratory at Calcutta, under Ex.P.12 from Sagar and the report of Calcutta Laboratory was received under Ex.P.13. According to the report received from the said laboratories, the Knife and the clothes, seized from the possession of the accused persons, were found to be stained with human blood. After completion of the investigation, the charge sheet was filed on 3.11.1987 in the Court of Judicial Magistrate, First Class, Manendragarh, who in turn committed the matter to the Court of Sessions vide order dated 03.12.1987 from where the matter was received on transfer by the Court of Addl. Sessions Judge, Manendragarh by order dated 19.1.1988 where the trial was concluded.

(3) The conviction of the accused persons is based upon the testimony of Ramjan (P.W.4) supported by medical evidence of Dr.A.P. Rai (P.W.3), who had firstly examined him on the requisition sent by the Police, and also Dr.P.K. Kar (P.W.1), the Deputy Medical Superintendent, Central Hospital, Manendragarh. The evidence of Dr. A.P. Rai would show that on medical examination of the victim on 3.8.1987, he found the following injuries:

(1) An incised penetrating wound in the middle of the stomach, slightly upper to the epigastrium region in size of 1½ cm width and 5 cm deep into the stomach

from which the stomach matter was coming out.

(2) An incised wound in size of 3cm x 2cm x 4cm on the right thigh.

According to him, both the injuries were caused by sharp edged weapon within 2 - 4 hours from the time of examination. Injury no.1 was grievous in nature and by the said injury, a lung was punctured and air was passing through the penetrated area of lungs. Injury no.2 was simple in nature. The doctor has proved his injury report as Ex.P.6.

(4) Learned counsel for appellant no.1 argued that in the facts and circumstances of this case, an offence u/s 307 IPC would not be made out against appellant no.1 and at the most, the offence would fall u/s 324 IPC. So far as appellant no.2 is concerned, it was argued that his conviction with the aid of section 34 I.P.C. is not justified, as the provisions of the said section would not be attracted in this case.

(5) I have heard learned counsel for the parties and have also perused the records of the Sessions Court.

(6) The victim Ramjan (P.W.4) has stated that after the second show was over at about 12.00 in the night, he was sleeping in the Video hall alongwith accused no.1 & 2 and the door of the hall was locked. At about 2 a.m., he heard some noise and when he woke up, the appellant no.1 inflicted a knife blow at the left portion of his stomach region below the left ribs. The second blow was given on his right thigh. In para 6 of his evidence, he has stated that at that time, the appellant no.2 was trying to hold his waist and he tried to snatch the knife from appellant no.1, but he could not succeed and both the

appellants ran away from the place of occurrence. So far as inflicting of two knife blows by the appellant no.1 is concerned, nothing could be brought by the defence on the basis of which, it may be disbelieved. The testimony of the victim to the extent that two knife blows in the above manner were given to him by appellant no.1 has been fully corroborated by the medical evidence of the two Doctors i.e., Dr. P.K. Kar (P.W.1) and Dr. A.P. Rai (P.W.3) and there appears to be no dispute regarding all this and, as argued by learned counsel for the appellant no.1, the point remains for consideration is as to what offence was committed by this appellant.

(7) In the matter ***of Sarju Prasad –Vs- State of Bihar, AIR 1965 S.C. 843***, the Apex Court held that in order to bring the offence home to accused, the prosecution must establish that his intention was one of the three kinds mentioned in section 300 I.P.C. The state of mind of the accused has to be deduced from surrounding circumstances and motive would be a relevant circumstance and where the evidence is not sufficient to establish with certainty, existence of requisite intention of knowledge of accused, the accused can be convicted only u/s 324 and not u/s 307 IPC.

(8) In ***Hari Kishan & State of Haryana –vs- Sukhbir Singh and others, AIR 1988 S.C. 2127***, the Apex Court further held that u/s 307 IPC, what the Court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this

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ingredient being established, there can be no offence of "attempt to murder". U/s 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention.

(9) In the case on hand, the intention or the knowledge of the appellant no.1 is writ large on record as it can be gathered from various circumstances coming forth in this case. Firstly, the weapon like Knife, which is of about 30 Cms. length, (14 cms of sharp area and 16 cms of grip area) has been used by this appellant and the place of body chosen by him is the epigastrium region. The severity of the blow and the quantum of force used can also be gathered as due to the said blow on the aforesaid region, the weapon has penetrated to the depth of 5 Cms and it has penetrated the lungs also from which, the air was coming out. Not only this, a very important factor is that after inflicting injury no.1, appellant no.1 again inflicted a second blow which was received by the victim on his right thigh. It shows that nothing had happened at a spur of moment and everything was premeditated. After giving the first blow, this appellant, with an intention to attempt the life of victim gave a repeat blow on him, which luckily could not inflict his vital part and was received at the thigh region. All these circumstances are suggestive of the fact that the intention or knowledge of the accused/appellant no.1 was such that he intended to kill the

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victim and he really attempted his life with the aforesaid intention. For the foregoing reasons, I do not find any force in the argument advanced by learned counsel for the appellant No.1 that in the facts and circumstances of this case, an offence u/s 307 IPC would not be made out against him. So far as offence u/s 25-A of the Arms Act is concerned, nothing has been argued before me in this regard and the finding recorded by the trial Court vide Para 14 of the judgment that the aforesaid weapon (knife) was a prohibited article within the meaning of the said Act appears to be fully justified and I hold it accordingly. Therefore, both the offences against appellant no.1 were rightly held to be proved by the Sessions Court.

(10) So far as appellant no.2 is concerned, he has been convicted with the aid of section 34 IPC and the allegation against him is that he was holding the waist of the victim at the time when the knife blow was given to him. In para 4 of the evidence of the victim (P.W.4) nothing has been said about his role by the victim. However, in para 6, he has stated that this appellant was trying to hold his waist and further Para 27 of his evidence completely demolishes the case of prosecution against this appellant as the same has been deposed in the following manner:

> "मेरे ऊपर के बयान में यह बात सही लिखी है, कि दल प्रताप ने मेरे पेट में चाकू मारा था, तब कमल नहीं पकड़ा था । मेरे पुलिस बयान में इस बाबत् यह गलत लेख है, कि कमल ने मेरी पहले कमर पकड़ ली थी और उसके बाद दल प्रताप ने मेरे पेट में चाकू मारा था ।"

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(11) Now the question arises about the conviction of this appellant with the aid of section 34 of IPC. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true contents of the section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. The existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but

must have been actuated by one and the same common intention in order to attract the provision. ***Please see Anil Sharma and others –Vs- State of Jharkhand (2004) 5 SCC 679***. The Apex Court further clarified that in 1870, Section 34 was amended by insertion of the words "in furtherance of the common intention of all" after the word "persons" and before the word "each", so as to make the object of section 34 clear. The section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under section 302 read with section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them.

(12) It was further held by the Apex court in the matter of ***Dani Singh –Vs- State of Bihar, 2005 SCC (Cri) 127 (para 20)*** that to constitute common intention, it is necessary that intention of each one of the accused be known to the rest and shared by them. Undoubtedly, it is difficult to prove even the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons. But however

difficult may be the task, the prosecution must lead evidence of facts, circumstances and conduct of the accused from which their common intention can be safely gathered. In most cases, it has to be inferred from the act, conduct or other relevant circumstances of the case in hand. The totality of the circumstances must be taken into consideration in arriving at a conclusion whether the accused had a common intention to commit offence for which they can be convicted. The facts and circumstances of cases vary and each case has to be decided keeping in view the facts involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law.

(13) Therefore, it is clear that a person merely because of his presence at or near the scene without even doing anything more, without carrying a weapon and without there being an element of sharing the common intention, cannot be convicted with the aid of section 34 IPC.

(14) In the opinion of this Court, in the facts and circumstances of this case, particularly in view of the evidence of the victim recorded vide para 27, it cannot be said with certitude that either the appellant no.2 has participated in commission of the said crime or the aforesaid crime was committed by appellant no.1 & 2 in furtherance of their common intention, therefore, I hold that the prosecution could not prove the case beyond all reasonable doubts against appellant no.2 and his conviction based upon the above evidence particularly with the aid of section 34 of IPC is not in accordance with law and the same deserves to be set aside.

(15) In the result, the appeal partly succeeds. The conviction and sentence awarded to appellant no.1 are confirmed and the conviction and sentence awarded to appellant no.2 are set aside. Accordingly, the appeal of appellant no.1 is dismissed and the appeal of appellant no.2 is allowed.

Sd/-
Sunil Kumar Sinha
Judge